* **HIGH COURT OF DELHI : NEW DELHI**

A.A.P. No.2/2007

% Judgment reserved on : 5th February, 2009

Judgment pronounced on : 8th May, 2009

M/s. Indusind Bank Ltd. ...Appellant
Through : Mr. V. Sesagiri, Adv.

Vs.

National Highways Authority of India & Anr. ..... Respondents
Through : Mr. Sandeep Sethi, Sr. Adv. with Mr. Tarun Dua and Mr. Abhishek, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MANMOHAN SINGH, J.

1. The appellant had filed the present appeal under Section 37[2] of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') assailing the order dated 03.07.2007 passed by the Arbitral Tribunal whereby the application of the appellant for its impleadment under Order 1 Rule 10 CPC read with Section 17 of the Act was dismissed.

2. It is the case of the appellant that the respondent no.2, i.e. M/s. Raja Projects International Limited, had entered into hire-purchase agreement with the appellant in 2000. The appellant raised invoices to

the tune of Rs.9,91,41,722/- on the respondent no.2 herein.

3. Due to the failure of the respondent no.2 to pay the said amount raised in the invoices, the appellant sent a legal notice to the respondent no.2 claiming the said amount. In 2002, the appellant had initiated the arbitration proceedings in terms of clause 16 of the arbitration agreement against the respondent no.2. Simultaneously, the appellant also filed an application under Section 9 of the Act for interim measure before the Second Additional Chief Judge, C T Civil Court, Hyderabad being O.P. No.2187/2002. In October'2002, the appellant in the said petition filed an application being IA no.3122/2002 for appointment of Receiver to take possession of the plant and machinery situated at Lucknow-Kanpur Section of National Highway no.25, which was allowed by the court vide order dated 28.10.2002.

4. The respondent no.1 herein/claimant filed a petition for impleadment under Section 9 before the C T Civil Court, Hyderabad on the ground that the respondent no.2 herein has defrauded the respondent no.1 and, therefore, the respondent no.1 is the owner of the property belonging to the appellant.

5. The respondent no.2 did not appear despite service of notices from the Arbitrator in arbitration proceedings initiated by the appellant. In the absence of the respondent no.1, the sole Arbitrator proceeded against the respondent no.1 *ex parte* and rendered the award dated 09.07.2003.

6. The contention of the appellant is that the respondent no.1 was fully aware of the fact that the plant and machinery presently lying

at two sites at the Lucknow-Kanpur Section of National Highway no.25 are financed by the appellant and without the consent of the appellant, the respondent no.2 could not have pledged or charged the said plant and machinery nor could have filed the petition under Section 9 of the Act before this court against the respondent no.2 being *OMP no.429/2002*.

7. In the said petition filed by the respondent no.1 against the respondent no.2, the *status quo* order was passed. This court also appointed Shri Balram Chopra, Registrar of this court, as Court Receiver vide order dated 06.12.2004 to take the symbolic possession of the plant and machinery lying at the two sites. The said order of this court was complied with by the Court Receiver, who had also filed his report dated 25.01.2005. Vide order dated 20.07.2005 this Court disposed of the *OMP no.429/2002* with the direction to the parties therein including the appellant to approach the Arbitral Tribunal before which the arbitration proceedings were already pending qua the claim of the respondent no.1 against the respondent no.2 for seeking appropriate relief.

8. In view of the fact that the matter was being remanded back to the Arbitral Tribunal, this court observed that the appellant may also approach the Arbitral Tribunal for permission to be heard in the matter subject to any objection that may be raised by the parties to the arbitration agreement. It was made clear that the order dated 20.07.2005 does not preclude the appellant from taking any other steps that may have also been taken to protect its interests.

9. The respondent thereafter approached the Arbitral Tribunal for further proceedings and on the other hand the appellant filed the appeal before the Division Bench of this court against the order dated 20.07.2005. The said appeal was dismissed as withdrawn on 04.09.2006 and the appellant was directed to approach the Arbitral Tribunal.

10. In September'2006, the appellant approached the Executing Court at Gurgaon for grant of precept for attachment of plant and machinery at two sites at Lucknow-Kanpur Section of National Highway no.25 on the basis of award passed in its favour and against the respondent no.2 herein.

11. The Executing Court, Gurgaon, on 08.09.2006 issued precept to the District Judge at Unnao and Orai for attaching the properties. However, after expiry of the period under Section 46 of the CPC, the appellant filed an application for extension of precept order before the Executing Court which according to the appellant is still pending. The appellant submits that the learned District Court, Unnao [Lucknow] on 04.09.2006 was pleased to attach the plant and machinery described in Schedule A of the Court Receiver's report.

12. In October'2006 the appellant came to know that the Arbitral Tribunal vide its interim order dated 03.07.2006 appointed Shri P D Aggarwal as Local Commissioner to take over the symbolic possession of the plant, equipment and other stores etc. from Shri Balram Chopra, Court Receiver appointed by this court and directed Shri P. D. Aggarwal to conduct the sale procedure of the said plant and equipment etc.

13. Aggrieved by the said order dated 03.07.2006, the appellant herein preferred an application under Section 17 of the Act seeking stay of the sale proclamation of the plant and machinery etc. lying at the two sites at Lucknow-Kanpur Section of National Highway no.25 and the appellant also moved an application under Order 1 Rule 10 CPC for impleading the present appellant bank as a necessary party to the arbitration proceedings before the Arbitral Tribunal. Vide the impugned order dated 03.07.2007, the application of the appellant was rejected.

14. The respondent no.1 questions the maintainability of the present appeal on the ground that under Section 37(2)(b), an appeal lies to a court from an order of the arbitral tribunal granting or refusing to grant an interim measure under Section 17 of the Act. It is argued that the appellant was neither a party to the Arbitration Agreement nor ever impleaded as a party, therefore, the dismissal of an application under Order 1 Rule 10 CPC cannot be appealed under Section 37(2)(b) of the Act.

15. Mr. Sandeep Sethi, learned Senior counsel for the respondent no.1 , strongly placed reliance upon the case of **Smt. Kanta Vashist & Ors. v. Shri Ashwani Khurana -- MANU/DE/0380/2008** wherein it was held that:-

> "……..An appeal against the order of Arbitrator was filed by the applicants and this court had observed that no appeal against the order of Arbitrator, turning down the request for impleadment of companies lies. I consider that Section 9 of the Arbitration and Conciliation Act is applicable only interse between the parties of the Arbitration Agreement."

16. The learned counsel for the respondent further argued that the appellant is guilty of forum shopping. The appellant has already approached the District Court, Gurgaon for seeking attachment of the property lying at the site of the construction. On 4th October, 2006, the Gurgaon Court passed an order to attach the plant and machinery. Thereafter the appellant filed an application before the Arbitral Tribunal for stay of sale proclamation which was admitted on 6th October, 2006.

17. It is further contended by the respondent that the appellant is not a party to the arbitration agreement between respondent nos. 1 and 2 and therefore they could not have been impleaded by the arbitral tribunal which rightly dismissed its application under Order 1 Rule 10 CPC. A person who is not a party to the arbitration agreement cannot claim any right before the Arbitral Tribunal and cannot be impleaded as a party. In this regard reference is made to the case of **First International Line S.A. Panama v. Chokhani International Ltd.; 2003 (3) Arb. LR 225 (Madras) (DB)** wherein it was observed that:-

> "Once the first respondent comes out with the clearest possible stand that it had its claim only against the second respondent and once there is an agreement of arbitration between the first respondent and the second respondent, the appellant would be a total stranger to the affairs even if the appellant is the owner of the vessels."

18. He also referred to the case of **National Highways Authority of India v. China Coal Construction Group Corpn. – AIR 2006 Delhi 134,** whereby a similar issue was decided by this Court and it was held that:-

> ".…….it becomes clear that the intervener has no privity of contract with NHAI. It is also clear that the intervener is not a party to the arbitration proceedings. Section 9 of the Act is with reference to arbitral proceedings just as the intervener cannot be a party in the arbitral proceedings pending between NHAI and China Coal, it has no locus standi in the present proceedings. The interim orders that may be passed under Section 9 or Section 17 are with respect to the parties to the arbitration and in connection with the subject matter thereof. As such, the intervener's application under Order 1 Rule 10 cannot be allowed……....."

19. In the case of **Reliable Finance Corpn. Pvt. Ltd. v. Ajoy Pal Singh; ILR (1987) 1 Del 267,** this Court dismissed an application for impleadment while holding that the applicant who is not a party to the agreement and who has not claimed any right under the agreement cannot be impleaded as a party.

20. Again in the case of **Pawan Kumar Jain v. Parduman Jain; ILR (2005) 2 Del 397,** it was held that a person who is not a party to arbitration agreement cannot be impleaded as necessary party to arbitration proceedings.

21. Recently, this Court in the case of **J.L. Kapur v. Burmah Shell Co-operative Housing Society (DB); 2008 (103) DRJ 527** held that as the NDMC was not a party to an arbitration agreement, it cannot be made a party to arbitration proceeding between petitioner and respondent-society.

22. In the case of **Sethi Construction Co. vs. Chairman and Managing Director, NTPC and another, 2002 (65) DRJ 732,** this Court refused to appoint an arbitrator vis-à-vis NTPC holding that there

was no arbitration agreement between NTPC and Sethi Construction Co.

23. Again in the case of **M.M. Aqua Technologies Limited vs. Wig Brothers Builders and Engineers Ltd and another2001(3) Arbitration Law Reporter 301 (Delhi),** this court held in Para 10 as under:-

> "10. ……Arbitration is distinguishable from other clauses in the contract. The other clauses set out the obligations which the parties have undertaken towards each other binding them, but the arbitration clause does not impose on one of the parties an obligation towards the other. It embodies an agreement of both the parties with consensus ad idem that if any dispute arises with regard to the obligations undertaken therein which one party has undertaken towards the other, such a dispute shall be settled by Tribunal of their own constitution. It must be construed according to its language and in the light of the circumstances in which it was made."

It was further held in paragraph 11 that:

> "11. From the foregoing discussion it is clear that to be a binding arbitration agreement between the parties, the same must be in writing and the parties should have specifically agreed to settle their disputes by arbitration. An arbitration agreement cannot be inferred by implication….."

24. It is also contended by the respondent that no property except the Hot Mix Plant on which the appellant claims the right in the appeal is lying at the site as per the report of the local commissioner of which attachment has been sought by the appellant before Gurgaon Court.

25. It is also submitted that during the arguments when this aspect was brought to the notice of this Court, the appellant agreed to concede that if this one property is handed over to it, the appellant is ready and willing to forgo its alleged claim over the other properties

lying at site.

26. It is alleged by the respondent that the appellant never exercised any rights over the said properties in the arbitration. The award passed by the arbitrator between the appellant and respondent No.2 was only a money decree and never adjudicated any rights of the appellant over the said properties.

27. It is submitted by the respondent no.1 that the agreement between respondent No.1 and 2 has been executed on 12th August, 1999 and Hire Purchase Agreement between respondent No.2 and appellant was executed in the months of November or December, 2000 or February, 2001 or January, 2002. The respondent no. 1, therefore, has a prior right in time over the said properties than the appellant.

28. It is alleged that the appellant in October, 2002 filed an application in Hyderabad High Court under Section 9 of the Act for appointment of receiver to take possession of the plant and machinery situated at Lucknow-Kanpur Highway. Vide order dated 28th October, 2002, the Advocate-Commissioner was appointed to take possession of the plant and machineries. However, the possession could not be taken by the Advocate -Commissioner as the workers of the respondent obstructed.

29. The respondent No.1 referred to Clause 61.1 of the Contract dated 12th August, 1999 between the respondent No.1 and respondent No.2 by virtue of which the respondent No.1 becomes the owner of the property since the contract was terminated in October,2002. The said clause is reproduced as under:-

> "61.1 All materials on the Site, Plant, Equipment, Temporary Works and Works are deemed to be the property of the Employer, if the Contract is terminated because of a Contractor's default."

30. The appellant submits that though under Section 19 of the Act, the Arbitral Tribunal is not bound by the Code of Civil Procedure, sub-clause 3 of Section 19 of the Act empowers the Tribunal to adopt its own procedure which it considers appropriate for conducting the Arbitration proceedings. It is alleged that the appellant is the owner of the plant and machinery financed to the respondent, vide order dated 6th December, 2004 passed by this Court in application for impleadment.

31. It is argued by the learned counsel for the appellant that when the Act stipulates that the Arbitral Tribunal is not bound by the Code of Civil Procedure as well as Indian Evidence Act, the same does not preclude the Arbitral Tribunal from applying the principles as enunciated under the Civil Procedure Code while conducting the arbitral proceedings.

32. The next contention of the appellant is that the term "party" as used in section 2(1)(h) of the Act ought not to be construed narrowly and should be given a wider /liberal interpretation to accommodate the legitimate rights, interest and claims of the party. It is submitted that if the appellant was not made a party to the Arbitration proceedings, the legitimate rights, interests and claims of the appellant would suffer grave prejudice and irreparable loss, damage and injury. He relied upon the judgment of **Chennai Container Terminal Pvt. Ltd. v. Union of India, 2007 (3) Arb. LR 218 (Mad)** to contend that under Section

2(1)(h), the import of the provision can be judicially expanded if the context so warrants. In this case Government of India, who was not a signatory to the Arbitration agreement was allowed to challenge the impugned award passed by the learned Arbitrator. If a person non-party to an arbitration agreement is permitted to challenge an award that purports to deal with a subject matter in respect whereof the person non-party claims certain legitimate rights or interest, then such person non-party ought also to be heard in such arbitration proceedings in respect of his rights and interests.

33. The learned counsel for the appellant also relied upon Section 9(2)(a) of the Act wherein under the special circumstances, the party can be impleaded as a necessary party. The term 'party' as used in Section 9 of the Act shall have the same meaning as ascribed to the term 'party' in Section 2(h) of the Act. If that being so, the appellant bank upon being impleaded as a party in the Section 9 application would be treated as a 'party' within the meaning of Section 2(h) of the Act.

34. It is argued that non exercise of the right provided under Clause 2(h) of the agreement does not take away the ownership right of the appellant bank over the subject property.

35. It is further argued that the judgment relied upon by the respondent in the matter of **National Highway Authority of India vs. China Coal Construction Group Corporation; 127(2006)DLT766,** is not applicable to the facts of the present case as in the said case, this Court denied the intervener from being impleaded as a party to the Section 9 Application on the ground that the intervener had no privy to the arbitration agreement.

36. The appellant prayed for setting aside the impugned order of the learned Arbitral Tribunal and to take possession of the plant and machineries lying at Orai and Unnao (Kanpur) from the Local Commissioner appointed by the Learned Arbitral Tribunal.

37. In the impugned order passed by the Arbitral Tribunal on 3rd July, 2007, the learned Arbitrator has dealt with the submissions of the appellants that though vide order 6th December, 2004 the appellant bank is impleaded in the said proceedings under Section 9 of the Act, but at the same time it was observed in the said order, it ought not to be construed to mean that there is an arbitration agreement between NHAI and Ashok Leyland Finance Ltd. (name changed to M/s. Indusind Bank Ltd.). The appellant bank, , on 4th September, 2006 withdrew the appeal filed against the order dated 20th July, 2005 wherein while disposing of the application under Section 9 of the Act M/s. Ashok Leyland Finance Ltd. was given the liberty to approach the arbitrators for permission to be heard, which will be subject to any objection that may be raised by the parties to the arbitration agreement.

38. The Arbitral Tribunal made the following observation while dismissing the application of the appellant bank for its impleadment.

> " 6.4. Section 2(h) of the Act defines the party and reads as under:-
>
> 'Party' means a party to an Arbitration Agreement.
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> The present Arbitration Agreement is between M/s. NHAI and M/s. Rana Projects International Limited. The Applicant Bank is not a party to the same.
>
> It becomes clear that the Applicant Bank has no privity of contract with NHAI.
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> 6.5. Further, as per the contract between NHAI and M/s. Rana Projects International Limited, all the plants & machinery brought

by the respondents for the project fall under the category of Contractor's equipment and it does not speak of ownership. The ownership of the plant & machinery is of no consequence so far as the present contract is concerned. The plant & machinery would all the same be known as Contractor's equipment whether it was owned or hired by the Contractor. The present Contract cannot be involved in resolving disputes between the Applicant bank and M/s. Rana Projects International Limited. It is for the Applicant Bank to sort out its disputes with M/s. Rana Projects International Limited separately.

6.6. Accordingly, we are of the unanimous opinion that the Application of the Applicant Bank under Order 1 Rule 10 CPC cannot be allowed."

39. Apparently the dispute between the parties in the instant case relates to the title of the machineries lying at the two sites of the National Highway No.25 of the Respondent No.1 which the Appellant is claiming to be its own. It is the admitted fact that the award dated 9th July, 2003 which was passed ex parte is already in favour of the Appellant who has already approached the Gurgaon court for grant of precept for attachment of plant and machinery lying at the site and the said court vide order dated 4th October 2006 has already attached the plant and machinery and order in this respect has already been obtained by the Appellant. The respondent No.1is contesting the said attachment orders. Consequently the Appellant is not a party to the arbitration agreement between respondent No.1 and 2 and in view of the well settled law on this aspect as referred in Paras 17 to 23 of this judgment, the appellant is not entitled to be impleaded as a party to the arbitration agreement. Therefore, the Arbitral Tribunal has rightly dismissed the application of the Appellant.

40. The argument addressed by the learned counsel for the Appellant has no force as in the petition filed by respondent No.1 before

this court being OMP No.429/02 under Section 9 of the Act, the appellant was impleaded as a party but at the same time while disposing of the said OMP by order dated 20th July, 2005 a direction was given to the parties to approach the arbitrator for further orders with regard to any interim measure as the court has observed in its order that the Finance Company M/s. Ashok Leyland Finance Ltd may approach the arbitrators for permission to be heard in this matter. It is clearly mentioned that this will, of course, be subject to any objection that may be raised by the parties to the arbitration agreement. It was also made clear that this order does not preclude M/s. Ashok Leylands Finance Ltd from taking any steps that it may have already taken to protect its interest. The Appellant thereafter filed an appeal against the said order dated 20th July, 2005. The Appeal was also dismissed as withdrawn on 4th September 2006. In the same month, the Appellant approached the executing court at Gurgaon to grant the precept for attachment of plant and machinery at the two sites on the basis of the awards in its favour and against respondent No.2 herein. The order was issued in favour of the Appellant in this regard. The contention of the Appellant is merit-less that the judgment referred by respondent No.1 has no application to the facts and circumstances of the present case as the term "party" as used in Section 2(1)(h) of the Act should not be construed narrowly and the court should give a wider and liberal interpretation to accommodate the legitimate rights, interests and claims of the parties. Learned

counsel for the Appellant has referred the judgment of **Chennai Container Pvt Ltd vs. Union of India 2007(3) ARL Page 418 (Madras)** in support of his submission wherein Section 2(h) has been interpreted by the Madras High Court. The facts and circumstances in this case are not similar to the facts of the present case. The judgment referred in Paras 18 to 23 of my judgment are directly applicable to the present case and, therefore, this decision referred by the learned counsel for the Appellant is distinguishable. I also do not agree with the contention of the learned counsel for the Appellant that the said judgments are not applicable as referred by respondent No.1.

41. I do not find any reason to disturb the findings of the learned Arbitral Tribunal. The order of Arbitral Tribunal under Order 1 Rule 10 cannot be reconsidered by this Court on merits. In view of settled law that a party who is not a party to the arbitration agreement cannot be impleaded as a party in the arbitral proceedings, I find no force in the contentions of the appellant bank. The appeal is hereby dismissed.

MANMOHAN SINGH, J.

MAY 08, 2009
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